Loose Leaf Hardware, Inc. *and* Highway and Local Motor Freight Employees, Local Union No. 667, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 26-CA-8271

26 August 1983

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND ZIMMERMAN

On 18 March 1983 Administrative Law Judge Joel A. Harmatz issued the attached Supplemental Decision[1] in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order, as modified below.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby overrules Employer's Objections 1 and 2 to the election conducted on 7 June 1979 in Case 26-RC-599, and our Order of 14 August 1980 is reaffirmed, with the Respondent, Loose Leaf Hardware, Inc., West Memphis, Arkansas, its officers, agents, successors, and assigns, ordered to take the action set forth therein.

[1] The Board's original Decision is reported at 251 NLRB 168 (1980).

[2] Respondent has excepted to the Administrative Law Judge's credibility findings, alleging that he did not rely on demeanor as a determining factor. Where the credibility determination is based on demeanor, it is the Board's established policy not to overrule an administrative law judge's resolutions unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Where the demeanor factor is diminished, the choice between conflicting testimony rests not only on demeanor but also on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *El Rancho Market*, 235 NLRB 468 (1978). We have carefully examined the record and find no basis under either standard for reversing the findings of the Administrative Law Judge.

We find no merit in Respondent's implicit allegation of bias and prejudice on the part of the Administrative Law Judge. Upon our consideration of the record and the Administrative Law Judge's Decision, we perceive no evidence that the Administrative Law Judge prejudged the case, made prejudicial rulings, or demonstrated prejudice against Respondent in his analysis or discussion of the evidence.

In fn. 11 of his Decision the Administrative Law Judge erroneously states that witness Vera Lewis testified that her recollection of the events of the 3 June 1979 union meeting was based on a review that morning of notes she had taken at the 1979 meeting. Our review of the transcript reveals that, while Administrative Law Judge Harmatz engaged in extensive cross-examination of Lewis on this subject, the witness did not make any statement as to when, if ever, she reviewed these notes. We hereby correct this mischaracterization of Lewis' testimony. However, in view of the Administrative Law Judge's additional findings and conclusions, we find it unnecessary to make any further findings with regard to Lewis' credibility.

[3] Having accepted this case on remand from the Sixth Circuit Court of Appeals, we view that court's opinion as the law of the case. Upon that basis and in light of the Administrative Law Judge's resolutions of credibility, we agree with the Administrative Law Judge's conclusion that Respondent has not established that the Union engaged in conduct which may reasonably be viewed as having interfered with the conduct of the election. Accordingly, we place no reliance upon the Administrative Law Judge's gratuitous commentary regarding the Board's decisional history pertaining to alleged campaign threats of potential strike violence.

[4] The Administrative Law Judge's recommended Order erroneously stated Respondent's place of business as Memphis, Tennessee, rather than West Memphis, Arkansas.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

This supplemental proceeding arises from an 8(a)(5) complaint based on Respondent's refusal to bargain with a newly certified labor organization (Highway and Local Motor Freight Employees, Local Union No. 667, affiliated with the Chauffeurs, Warehousemen and Helpers of America)[1] and is limited to a renewed consideration of Respondent's Objections 1 and 2 to conduct allegedly affecting the results of an election held on June 7, 1979, in Case 26-RC-5990.[2] The supplemental hearing was held before me on November 1, 1982, in Memphis, Tennessee, pursuant to the Board's "Order Remanding Proceeding to Regional Director for Hearing,"[3] which in turn was pursuant to an order of the United States Court of Appeals for the Sixth Circuit, dated December 14, 1981, remanding for a hearing on said objections.[4] After close of the supplemental hearing, briefs were filed by Respondent and the Charging Party.[5]

[1] The Charging Party's name is shown as amended at the hearing.

[2] Official notice is taken of the record in the underlying representation proceeding, as the term "record" is defined in Sec. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended.

[3] Unreported Order, dated June 24, 1982. See G.C. Exh. 1(c).

[4] 666 F.2d 1036.

[5] On February 3, 1983, the Board (Member Jenkins dissenting) issued its decision in *Home & Industrial Disposal Service*, 266 NLRB 100, a case which revises Board policy in a manner tending to support the legal sufficiency of Respondent's factual allegations concerning the invalidity of the aforedescribed election. Thereafter, on February 23, 1983, Respondent filed a motion for leave to submit a supplemental memorandum in connection therewith, stating that "the principles of substantial justice mandate and require that the Charging Party . . . be notified of the decison and the ramifications that the Respondent believes the decision has to the instant case." The motion is denied. The supervening change in Board policy adhering to the views of the Fifth Circuit expressed in *Hickory Springs Mfg. Co. v. NLRB*, 645 F.2d 506 (5th Cir. 1981), and of the Sixth Circuit in *Loose Leaf Hardware v. NLRB*, 666 F.2d 1036 (6th Cir. 1981), on balance, furnishes no substantial justification for further delays in resolving a question concerning representation raised almost 4 years ago. Moreover, Respondent has already had ample opportunity to articulate its position with respect to what now stands as controlling Board authority.

I. BACKGROUND

The Union filed a petition in Case 26–RC–5990 on April 24, 1979, seeking certification as representative of certain employees of Loose Leaf Hardware, Inc. Thereafter, on May 7, 1979, the parties entered a Stipulation for Certification Upon Consent Election. Accordingly, an election was held in the appropriate unit on June 7, 1979, with the tally showing that of 164 eligible voters 99 ballots were cast for, and 66 against, representation. There were no challenged ballots. On June 14, 1979, the Employer filed objections to conduct affecting the results of the election including, *inter alia*, its Objections 1 and 2 which read as follows:

> 1. Prior to the election business agents of the Petitioner [Union] openly threatened and harassed employees with physical violence or other reprisals if they crossed a picket line that might be established by Petitioner.
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> 2. In connection with the above threats made by business representatives of the Petitioner, statements were also made to employees, which condoned, prior to the election, harrassment of employees against the Petitioner by employees who supported the Petitioner and, as a result, an atmosphere was created within the Employer's plant whereby employees were coerced into voting for the Petitioner and denied a free choice.

Thereafter on July 13, 1979, the Regional Director for Region 26 issued a "Report on Objections" overruling all of Respondent's objections without benefit of an evidentiary hearing and recommending that the Board issue a Certification of Representative. With respective to Objections 1 and 2, the report specifically stated:

> There is insufficient evidence that employees were threatened, harassed or coerced in voting for the Petitioner. Further, assuming *arguendo* that a union representative did advise employees of harmful consequences should they chose to cross Petitioner's picket line, the alleged statements do not involve a threat to employees based on how they would vote in the upcoming election. There is no evidence that the Petitioner intended to strike prior to the election, and, therefore, the remarks do not relate to events concerning the election, but rather some unspecified, unpredicted time in the future should the Petitioner become the employees' bargaining representative. Hence, such conduct would not be likely to have affected the outcome of the election.[6]

The Employer filed timely exceptions to the aforesaid ruling and on November 5, 1979, a divided Board Panel issued a Decision and Certification of Representation which adopted, *en toto*, the recommendations of the Regional Director and certified the Union as exclusive representative of employees in the appropriate unit.[7] In overruling the objections, the majority stated (at fn. 2) as follows:

> The alleged threats of "violent reprisals" on which our dissenting colleague would set aside the election apparently refer to statements allegedly made by a union agent at a meeting of unit employees. According to one employee witness who was present at the meeting, the union representative told the audience that the Teamsters control the actions on the picket line, but not off the picket line. She claimed the union representative further told the audience that people who crossed the picket line had accidents attributed to "acts of God." While we find these remarks to be ambiguous, we also find that they are unrelated to the outcome of the election or the way the employees voted in the election and, therefore, provide no basis for setting the election aside. *Hickory Springs Manufacturing Company*, 239 NLRB 641 (1978).

In the face of this adverse ruling, Respondent refused to recognize and bargain with the Union, electing instead to pursue its challenge to the validity of said certification on various grounds, including the overruling, without a hearing, of its Objections 1 and 2. Accordingly, on August 14, 1980, the same Board Panel, over the dissent of Member Penello, issued its Decision and Order in the above-entitled proceeding granting the General Counsel's Motion for Summary Judgment, finding that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as certified bargaining representative of employees in the appropriate unit.[8]

The matter then came before the United States Court of Appeals for the Sixth Circuit upon cross-petitions for enforcement and review. Pursuant thereto, the court issued an order in which it held that the Board had erred by denying Respondent a hearing in Objections 1 and 2, stating in material part as follows:[9]

> In refusing to bargain with the Union, petitioner Loose Leaf Hardware, Inc., which had consented to the holding of the election, complained that the election was fatally tainted by certain misconduct of the union agents, particularly its business agent, one Ed Jones. Jones' comments concerning the coercive tactics of the Union in connection with collective bargaining for a contract, *e.g.* the "accidents" that had befallen people who crossed Teamster picket lines, were claimed to have destroyed the laboratory conditions necessary to a free and fair election.
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> Upon a consideration of the record as a whole, the court is of the opinion that it was error for the Board to have denied the petitioner a hearing on its first two objections to the election, given the nature and the seriousness of the charges. See *Hickory Springs Manufacturing Co. v. NLRB*, 645, 506 (5th Cir. 1981).

[6] See G.C. Exh. 2, pp. 4–5.

[7] 246 NLRB 350. (Chairman Fanning and Member Jenkins, with Member Penello dissenting.)

[8] 251 NLRB 168.

[9] 666 F.2d 1036 (1981).

Hence enforcement was denied and the proceeding was remanded to the Board for a hearing on the objections.

II. CONCLUSIONS ON REMAND

Pursuant to established policy, a party that seeks to overturn the results of an election bears the burden of showing that it was not fairly conducted. *NLRB v. Oesterlen Services for Youth*, 649 F.2d 639, 640 (6th Cir. 1981), citing *NLRB v. Mattison Machine Works*, 365 U.S. 123 (1961). And, as a general rule, where employees have expressed a preference for collective bargaining, this burden requires a showing that the designated representative or its agents engaged in coercive conduct which served to create a general atmosphere of fear and coercion and thus destroyed the laboratory conditions required for conducting a free election. *NLRB v. Bostik Division*, 517 F.2d 971, 972 (6th Cir. 1975); *Central Photocolor Co.*, 195 NLRB 839 (1972).

In the course of the instant hearing, Respondent's attempt to substantiate its burden rested on the testimony of two witnesses, employees Brenda Johnson and Chester Mooneyhan. Before addressing Respondent's presentation, it is necessary to point out that ascertaining the scope of the remand is complicated by the fact that said testimony comprised the entirety of the case offered in support of the objections, and stands in contrast, with the more elaborate showing previously represented to the court of appeals. Thus, additional incidents, not litigated here, were described in the brief submitted on behalf of the Employer to the court, wherein it was stated as follows:

> Loose Leaf's Objection 1 and 2 allege that the Union threatened employees with violence and other reprisals if they crossed the picket line and that pro-union *employees* harassed and intimidated other employees, thereby creating an atmosphere of fear in the Employer's plant which made a fair election impossible. The abbreviated investigation conducted by the Regional Office revealed, an employee who testified that he was told by another individual that if one crossed a picket line at the plant, *the Union would send people to physically assault them and damage their property*; an employee, after answering affirmly [sic] the question of whether he would cross a picket line, was told by a pro-union employee that ". . . if anyone tries to cross the picket line there is going to be trouble"; an employee who testified that she attended a union meeting in which a Union representative advised the audience that the Union controlled the actions on the picket line, but not off the picket line, and that people who crossed the picket line had accidents attributable to "acts of God"; and an employee who testified that *one night she was followed for several miles after leaving work by a pick up truck driven by a group of employees and a union representative.* [Emphasis supplied.]

The interlineated conduct though far reaching and serious was not confirmed by evidence adduced in this supplemental proceeding. This disparity takes on significance when considered in light of the court's Order which adverted to "the record as a whole" as the foundation for the remand, while omitting particularization as to whether all or part of the incidents called to its attention would suffice to give rise to material issues of fact concerning the validity of the election.

In any event, turning to Respondent's proffer, it is noted that Brenda Johnson had been employed as a machine adjuster with Respondent since shortly prior to June 1979. She testified that on June 3, 1979, 4 days prior to the election, she attended a union meeting at the Ramada Inn in West Memphis, Arkansas. The meeting was chaired by Maurice Smith and Duria Jones, both union business agents at the time. It was attended by some 60 to 75 employees. Johnson further testified that during the meeting a question was raised by an unidentified individual from the floor concerning what might transpire if a strike were called and employees elected to cross a picket line. According to Johnson, Jones responded by indicating "that there was not to be any violence on picket line [sic] whatsoever, but what happened off the picket line they could not be responsible for." However, in what was described by Johnson as having been expressed by Jones in "a joking manner," the latter gave various examples of "Acts of God" that had befallen those who had crossed picket lines, including a carport falling on someone's automobile and a serious accident. Although Johnson referred to a third example, the specifics as to its nature exceeded her capacity for recall. She acknowledged that this was the only incident that she experienced during the preelection campaign which she considered as reflecting adversely on the Union's conduct.

In accord with Johnson, Business Agent Smith recalled an inquiry concerning picket lines at such a meeting. However, contrary to the testimony of Johnson, he claimed to have responded simply that Teamsters do not cross picket lines, while denying that either he or Business Agent Jones gave any examples of violence.[10] On cross-examination, Smith admitted that he was only present for approximately one-half of the meeting and was unaware of what may have transpired prior to his arrival or after his departure. Jones testified that he was present for virtually the entire meeting, that he was asked a question concerning the crossing of picket lines, but that he responded that the Union did not condone violence. He denied making any statements concerning violence away from picket lines or giving examples of mishaps that might have befallen those who crossed picket lines.[11]

[10] This is at odds with the testimony of Johnson who imputed no statement to Smith concerning the crossing of picket lines or violence resulting therefrom.

[11] Vera Lewis and Barbara Bobo, former employees of Respondent, claim to have attended the meeting in question. They were offered by the Union apparently to corroborate Smith and Jones. No weight is assigned the testimony of either. Lewis initially testified that she possessed independent recollection of what transpired at the specific meeting in question, but on cross-examination, she recanted, stating that her account was based on a review that morning of "notes" she had taken at that very meeting. In a further contradiction, Lewis allowed how she had not looked at the notes since the meeting. Obviously, I had no confidence in

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In weighing the testimony of Smith and Jones against that of Johnson, I reject the testimony of Johnson who might well have labored under a union bias.[12] Thus she admitted, on cross-examination, her displeasure with the Union dating back to the election, when as a new hire the Union apparently challenged her ballot and, as she recalls, prohibited her from voting. Furthermore, dispite the evidence that the meeting was attended by a substantial number of employees, Respondent failed to supplement its proof in this regard through a single corroborating witness.[13]

As indicated, the only other witness offered in support of the objections was Chester Mooneyhan, a tool-and-die worker employed by Respondent for the past 17 years. He testified that a "few days" prior to the election he was party to what in his own words was a "minor conversation," with John Brown, coworker. In the course thereof, Brown asked Mooneyhan what he would do if the Union were voted in and there were a strike. Mooneyhan, noting that he had a family to support, replied that, if the Company permitted, he would cross the picket line and go to work. Brown allegedly stated that if Mooneyhan crossed there would be "trouble." Although the foregoing was uncontradicted, there was no direct showing or reasonable basis for inferring that Brown was an agent or representative whose conduct could be deemed binding on the Union.[14] Nor does *credible* evidence reflect that the statement ascribed to Brown was consistent with any policy, conduct, or position manifested by the Union.[15] Indeed, although Mooneyhan opined that Brown favored organization and made reference to the prounion role played by Brown's mother in the campaign, he conceded that he seldom discussed the Union with Brown and that Brown never tried to convince him to join or vote in favor of the Union.

As a general proposition an election will not be invalidated on the basis of coercive acts which are not attributable to a party. Exceptions have been recognized, but the Board has moved cautiously in this respect, noting that it "accords less weight to . . . [third party] . . . conduct than to conduct of the parties." *Orleans Mfg. Co.*, 120 NLRB 630, 633 (1958); *Cross Baking Co.*, 191 NLRB 27, 28 (1971). Indeed, where coercive conduct is derived from anonymous sources,[16] third parties,[17] or rank-and-file employees whose only link with the Union is their desire for representation,[18] elections have been overturned in only the more extreme factual contexts; namely, where "the election was held in a general atmosphere of confusion, violence, and threats of violence, such as might reasonably be expected to generate anxiety and fear of reprisal, to render impossible a rational uncoerced expression of choice as to bargaining representation." In such circumstances, "It is not material that fear and disorder may have been created by individual employees or non-employees and that their conduct can not probatively be attributed either to the Employer or to the Union. . . . The significant fact is that such conditions existed and that a free election was thereby rendered impossible." *Al Long, Inc.*, 173 NLRB 447, 448 (1968); *Electronic Components Corp. of North Carolina v. NLRB*, 546 F.2d 1088, 1092–93 (4th Cir. 1976); *Methodist Home v. NLRB*, 596 F.2d 1173 at 1183 (4th Cir. 1979). On the other hand, the Board has not been unmindful that in the heat of a campaign forces are unleashed that are beyond the control of either party, and, indeed, self-espionage is not always out of the question. Thus, "[the] actual facts must be considered in light of realistic standards of human conduct . . . ."[19] before the results of an election are overturned. And the viability of elections would stand on a rank-and-file employee, whether pro- or antiunion, would furnish a basis for invalidating an election. In the light of the foregoing, it is concluded that the off-handed statement attributed to Brown by Mooneyhan, being isolated, lacked the pervasive characteristics warranting a conclusion that on this limited basis the choice manifested by employees was coerced, or registered in an atmosphere lacking the degree of fairness required by statutory policy.[20]

In sum, the factual claims made on behalf of Respondent to the court of appeals have not been substantiated by credible proof on this record. But, even if the testimony of Johnson were viewed as believable, a determination upholding the election would not appear to do violence to the reservations advanced by the Fifth Circuit in *Hickory Springs Mfg. Co., supra* by the Sixth Circuit herein, or by the new policy set forth recently by a Board majority in *Home & Industrial Disposal Service, supra*, 266 NLRB 100 (1983). In all three, the *per se* approach previously adopted by the Board in denying hearings with respect to preelection threats of strike violence was repudiated. Accordingly, under present Board policy, hearings are authorized on such objections. However, no case has been called to my attention in which an election was set aside on the basis of this form of misconduct. Had I believed Johnson, it would have remained necessary to resolve whether the conduct she imputes to union representative Jones warranted a rerun election.

In concluding that it would not, it is noted that objections founded on the type conduct in issue here, during

her verity. Bobo testified in a more forthright manner. She admitted that there had been several union meetings, that she had attended some and not others, and that she had no independent recollection of the June 3 meeting. Accordingly, her testimony is ineffectual to throw light on the matters in issue.

[12] I have not overlooked the fact that while Johnson singled out Jones, both Jones and Smith claim to have responded to the inquiry concerning picket lines. Whether they did so or not is beside the point, inasmuch as my resolution of credibility is based on my disbelief of Johnson, rather than any persuasive quality in the Union's presentation.

[13] Although there were representations to the effect that Respondent's effort to obtain corroboration were complicated by several factors; including reductions in the work force, it is fair to assume that Respondent's personnel records have been available at all times since the election. Indeed, a timely and responsible investigation by the Employer comtemporaneous with the fashioning of the objections seemingly would have produced any existing facts confirming the Employer's challenge to the expressed preference for union representation by its employees. Certainly the Employer knew at that time that evidence was essential if its position were to be sustained by the Regional Director, the Board, or a court.

[14] *Certain-Teed Products Corp. v. NLRB*, 562 F.2d 500 (7th Cir. 1977).

[15] *National Maritime Union (Delta Steamship Lines)*, 147 NLRB 1328, 1330, fn. 6 (1964).

[16] *Chillicothe Paper Co.*, 119 NLRB 1263 (1958).

[17] *Lifetime Door Co.*, 158 NLRB 13, 24–25 (1966).

[18] *Hickory Springs Mfg. Co. v. NLRB, supra.*

[19] See *Owens-Corning Fiberglass Corp.*, 179 NLRB 219, 223 (1969).

[20] *Bostik, supra*, 517 F.2d at 975.

the past 14 years have had a checkered history before the Board. In 1969, the Board declined to set aside an election based on such threats in *Great Atlantic & Pacific Tea Co.*, 177 NLRB 942, observing "the remarks . . . neither relate to events surrounding the election nor were they calculated to coerce employees to vote for the petitioner." However, in 1974, the Board directed a hearing on similar objections in *Provincial House*, 209 NLRB 215 (Chairman Miller and Members Kennedy and Penello), a result which, without comment, appeared to reverse *Great Atlantic & Pacific Tea Co.*. The holding in *Provincial House* remained viable for a period of some 4 years, but, in 1978, a divided Board in *Hickory Springs Mfg. Co.*, 239 NLRB 641 (Members Penello and Murphy dissenting), reverted to the earlier rule, reasoning that coercive statements concerning what might transpire after the union achieves representative status raise no material issues as to the validity of the election. In so holding, the Board reasoned as follows:

> If the Union here had threatened violence against employees for voting against it, we would, of course, have set this election aside. However, the evidence adduced by the Employer which, for purposes of this Decision, we deem to be true shows prounion employees, in the presence of the union agent, threatened employees with violence if the employees crossed the picket line of the Union. Inasmuch as there was no picket line then in existence, nor was on imminent, the so-called threats were thus conditioned on the Union winning the election, the contract negotiations with the Union failing, the Union calling a strike, and some employees opting not to honor the picket line. With these contingencies standing between the threats and their possible execution, we perceive little if any likelihood of the statements having any immediate coercive impact on the employees and the election results.
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> Furthermore, the employees had it within their power to blunt the threats entirely by voting . . . against the Union. By so voting, the employees could avoid altogether the primary contingency on which the threatened conduct was premised; namely, a union victory. Indeed, we believe that the immediate effect of the Union's conduct, if any, would be to cause employees to be repelled by it and to vote against it. . . . [T]he Union's forecasts of future strike misconduct were not reasonably related to the election and its results and, therefore, did not destroy the "laboratory conditions" in which Board-conducted elections must be conducted. . . .

This conclusion was pitted against the equally possible assumption previously outlined in *Provincial House*, 209 NLRB 215 (1974), wherein a similar threat was evaluated and deemed "not innocent, 'puffery,' but . . . instead a clear threat of forceable union reprisals against anyone who crossed the picket line established by the Union, thus creating an impression that the Union could and would, resort to whatever means—lawful or unlawful—might be required effectively to exercise its power over employees." In 1981, this latter view was adopted by the Fifth Circuit of Appeals. Thus, in *Hickory Springs Mfg. Co. v. NLRB*, 645 F.2d 506 (5th Cir. 1981), that court rejected the notion that evidentiary hearings would never be warranted on such allegations. The possibility of a coercive influence upon the election itself was acknowledged by the court through reasoning that a labor organization which resorts to threats, even if merely related to a possible strike action, rather than the election itself, conveys a propensity or perhaps predilection to use violence against any employees that stand in its way, including those who might choose to vote against representation. In this regard, the court specifically stated as follows:

> Men judge what others will do on given occasions by their prior actions and, less reliably, doubtless by their statements about their intended future actions. So they assess what kind of folk they are dealing with and how those folk are likely to react if crossed. Even the implicit threat of a club or pistol on the hip, without more, may be sufficient to influence significantly the conduct of those who are cast in company with the bearer.[21]

As indicated, the court's view as to the desirability of a hearing on such objections was finally adopted by a Board majority on February 3, 1983, in *Industrial Disposal Service, supra*, 266 NLRB 100, 101, over a dissent by Member Jenkins. Thus, *Provincial House* was resurrected as valid precedent, on reasoning that:

> Consistent with the position taken by the circuit court, we believe it unrealistic to conclude that a union agent's threats of bodily harm, damage to personal property, or the like, cannot, as a matter of law, impact on an election merely because the threat in question is couched in terms of possible future conduct. Such an approach does not take into account the tendency of such threats to have a substantial and destructive effect on free and open campaign discussion, as well as freedom of choice at the polling place itself. A campaign environment in which a union threatens that violent repercussions will ensue, should employees choose to oppose it in the future, is one in which there is substantial likelihood that employees will be inhibited from expressing their actual views, and is surely one which jeopardizes the integrity of the election process. It can hardly be gainsaid that an employee faced with union threats of personal injury will think twice before pinning on a "vote no" button or passing out antiunion literature. A union can, by stilling the voices of just a few employees who oppose it, successfully paint a false picture of its

[21] 645 F.2d at 510. It will be recalled that in 1979, the objections in the instant case was overruled by a Board majority, without benefit of hearing, on authority of the Board's position in *Hickory Springs*. Also as heretofore indicated, the Sixth Circuit Court of Appeals disapproved this result by remanding the instant case for hearing on authority of the Fifth Circuit's position in *Hickory Springs*.

> support among the electorate and thereby influence the votes of those employees who find themselves undecided. Such threats may well have an additional indirect effect on other workers who might have been swayed against the union, had the voices of all employees been heard. Moreover, in any given case, depending on the number, nature, and severity of the threats involved, some employees who are either uncertain, or otherwise opposed to the union, will likely be inclined to opt for the safety of capitulation and decide to cast their lot with the union—the secrecy of the ballot box notwithstanding.

The foregoing, however, does not sanction the view that elections are to be invalidated in all contexts simply because a union representative made a statement during the preelection period that some form of reprisal might be taken against an employee who crossed a picket line during an economic strike. Instead, the approach endorsed by these later decisions merely requires a hearing, followed by full analysis of the evidence developed in terms of the coercive influences of such statements, and whether or not they in fact could have had an impact on the election in question. Fundamental to the analysis is the acceptance over the years by various Boards that such threats might well impact on employee choice as instilling a fear of reprisal, or, to the contrary, that the election would remain unaffected in that employees turned off by allusions to strike violence would simply vote the union out. It is in this light that the testimony of Johnson has been considered. Thus, according to the scenario depicted by her, the reference to the adverse consequences that had befallen individuals that had crossed a picket line, was made but once, and hence was isolated, and not made in the context of a broader pattern of intimidation either sponsored, ratified, or condoned by any union official.[22] Indeed, the alleged misconduct, which was expressed in response to inquiry from an unidentified source would not have been taken by employees as premediated or as suggesting a calculated desire by the Union to inject into the campaign, on its part, a predisposition to effect reprisals against any who failed to adhere to its wishes.

Quite to the contrary, in this preelection campaign other evidence suggests, more directly, that it was the Employer, not the Union, which sought to capitalize upon the prospect of postelection violence. This evidence also developed at the instant hearing offers a tactical reminder of the interpretation by the Board majority in *Hickory Springs, supra*, that "the immediate effect of the Union's conduct, if any, would be to cause employees to be repelled by it and to vote against it."[23] Thus, employee Mooneyhan, a witness for the Employer, related that during the campaign, Respondent on several occasions showed films to employees, which "depict[ed] violence at the picket line or as a result of the strike." Against such a background, it is not farfetched to conclude that Respondent on the heals of the election has cried "foul" based on the very "mind set" it attempted to create.

Based on the foregoing, it is concluded that even if believed, the evidence produced at the supplemental hearing in this proceeding did not influence and ought not disturb the 99-66 vote by which employees designated the Union as exclusive statutory representative herein.

Upon the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[24]

Pursuant to Section 10(c) of the Act, Employer Objections 1 and 2 to the election conducted on June 7, 1979, in Case 26-RC-5990 are hereby overruled, and the Order of the National Labor Relations Board dated August 14, 1980, is hereby reaffirmed, with the Respondent, Loose Leaf Hardware, Inc., Memphis, Tennessee, its officers, agents, successor, and assigns ordered to take the action set forth therein.

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[22] At the hearing, Respondent requested that official notice be taken of *Weyerhauser Co.*, 244 NLRB 1153 (1979), and 247 NLRB 978 (1980). Counsel for Respondent described that case as involving "the same kind of conduct by the same Petitioner in the sam [sic] location, that is the subject of objections . . . [w]ithin months of the . . . conduct . . . in this case." However, the conduct charged against the Union in that case was never made the subject of hearing or finding and hence merely constitute naked allegations of no utility herein.

[23] 239 NLRB at 642. There was nothing unique about the Employer's injection of this issue in this campaign. Experience shows that antiunion campaigns frequently are propped by extensive efforts to disparage unions by tracking the general history of labor strife in this country while using same to discredit unionization as tyranny backed by terrorism. Thus, it need not be gainsaid that the opponents of collective bargaining have themselves deliberately attempted to convince voters that unions "resort to whatever means—lawful or unlawful—might be required effectively to exercise its power over employees." *Provincial House, supra*, 209 NLRB at 215. It follows that many employers subscribe to the analysis that this form of propaganda tends to produce a rejection of union representation.

[24] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.